

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NOS. 2017-305-E, AND 2017-370-E

In Re:)	
)	
Request of the South Carolina Office of)	
Regulatory Staff for Rate Relief to)	
SCE&G Rates Pursuant to)	
S.C. Code Ann. § 58-27-920)	
<hr/>)	
In Re:)	
)	
Joint Application and Petition of South)	
Carolina Electric & Gas Company and)	
Dominion Energy, Inc., for review and)	
Approval of a proposed business)	
combination between SCANA)	
Corporation and Dominion Energy, Inc.,)	
as may be required and for a prudency)	
determination regarding the)	
abandonment of the V.C. Summer Units)	
2 & 3 Project and associated customer)	
benefits and recovery plan.)	
)	

**SPEAKER LUCAS’S BRIEF IN
SUPPORT OF APPROVING A PLAN
THAT PROVIDES MAXIMUM
CUSTOMER BENEFITS**

Pursuant to section 103-851 of the South Carolina Code of Regulations, Intervenor James H. “Jay” Lucas (Speaker Lucas), in his official capacity as Speaker of the South Carolina House of Representatives, submits this brief in support of the Public Service Commission of South Carolina (the Commission) approving a plan that (1) provides maximum customer benefits, (2) brings finality and certainty, and (3) is in the public interest of South Carolina. See S.C. CONST. art. IX, § 1 (“The General Assembly shall provide for appropriate regulation of . . . privately owned utilities serving the public as and to the extent required by the public interest.”).

I. INTRODUCTION

This matter comes before the Commission on (1) the South Carolina Office of Regulatory Staff's (ORS) request for rate relief; and (2) the Joint Application and Petition of South Carolina

Electric & Gas (SCE&G) and Dominion Energy, Inc. (collectively “the Joint Applicants”) for a prudency determination regarding the abandonment of nuclear construction of two nuclear units at the V.C. Summer plant (the Project) and for the Commission’s approval of the merger between SCANA and Dominion. Undoubtedly, this case presents one of the most difficult and complex legal challenges the Commission and the State of South Carolina has ever faced. The Commission must review the abandonment request pursuant to the Base Load Review Act (the BLRA), S.C. Code Ann. §§ 58-33-210 through -298, as it determines the prudency of SCE&G’s actions and whether to allow the continued recovery of revised rates post-abandonment. In addition to making a prudency determination regarding abandonment, the Commission must set an appropriate rate going forward. Further, in considering the Joint Applicants’ merger request, the Commission must decide whether the merger is in the public interest of the citizens of South Carolina.

The General Assembly, of course, enacted the BLRA in 2006. The BLRA created a new mechanism for utilities to recover construction costs of nuclear plants. Specifically, the BLRA authorizes the utility to file an application seeking the Commission’s approval to construct a nuclear-powered facility. To construct a nuclear plant, a utility must seek a prudency determination from the Commission that can allow for the recovery of incurred capital costs during the construction of a nuclear facility. Upon completion of review of a utility’s application, the Commission is authorized to issue a base load review order approving rate recovery for plant capital costs. An order may further establish, among other things, the construction schedule, the estimated capital costs, and the return on equity.

The BLRA also describes the conditions for determining what costs properly may be included in rates. The BLRA, in pertinent part, provides as follows:

A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are

properly included in rates so long as that plant is constructed or being constructed within the parameters of (1) the approved construction schedule including contingencies, and (2) the approved capital costs estimates including specific contingencies.

S.C. Code Ann. § 58-33-275(A). In other words, the BLRA authorizes a utility to recover its constructions costs so long as the plant is constructed or is being constructed.

Prior to completion of construction, a utility may determine to abandon the construction of a nuclear plant. If the utility chooses to do so, the BLRA establishes a procedure for the utility to follow under which the Commission may determine whether the abandonment decision is prudent.

To that end, the BLRA provides the following:

[T]he recovery of the utility's capital costs and the utility's cost of capital associated with them may be disallowed only, to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that utility could have acted to avoid or minimize the costs.

S.C. Code Ann. § 58-33-280(K).

The General Assembly amended the BLRA in 2018. See 2018 S.C. Act No. 287. Act 287 instructed the Commission to set an experimental rate for SCE&G at a level equal to its current rate less the revised rate increases. Act 287 further provided the experimental rate would terminate upon a final ruling of the Commission in this proceeding. Additionally, Act 287 repealed the BLRA for any future projects and provided definitions of "prudence," "imprudence," and "fraud."

II. ANALYSIS

A. All costs incurred on the Project after March 12, 2015 were imprudent.

SCE&G is not entitled to recover any construction financing costs via revised rates that were incurred after March 12, 2015. The Commission should find all costs after that date were imprudently incurred and exclude those imprudent costs from rates.

At the outset, a plain reading of the relevant BLRA provisions reveals SCE&G is not entitled to recover any revised rates following its July 31, 2017 abandonment of the Project. Subsection 58-33-275(A) of the South Carolina Code provides that “a base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses” that “are properly included in the rates so long as that plant is constructed or being constructed within the parameters of (1) the approved construction schedule including contingencies; and (2) the approved capital costs estimates including specific contingencies.” (emphasis added); see also S.C. Code Ann. § 58-33-275(C) (limiting recovery to when a plant “is constructed or being constructed”). Subsection 58-33-275(B) does not alter the limitations of subsections 58-33-275(A) and (C). Subsection (B) only precludes alteration of the approved rates during construction or when a project is properly completed. If the utility fails to satisfy the requirements of subsection (A), it loses the nonreviewability protections offered in subsection (B).

Further, subsection 58-33-280(K) does not allow for full recovery of the nuclear rates just because an initial prudence determination to begin construction was made under subsection 58-33-275(A). Instead, subsection 58-33-280(K) requires the utility to show abandonment was prudent, and if the PSC agrees, then it retains the discretion to determine which costs and expenses, if any, are recoverable. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly].”); Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) (“If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.”).

The “[w]ithout limiting the effect of [s]ection 58-33-275(A)” language in subsection 58-33-280(K) does not bind or restrict the Commission’s abandonment analysis. Rather, it means a party cannot end-run subsection 58-33-275(A) while construction is ongoing by seeking to readdress prudence determinations or rate orders. See S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 358–59, 764 S.E.2d 913, 918–19 (2014) (holding that an abandonment analysis is improper during construction of a nuclear project because “the possibility of prudence challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them”).

Here, because the Project was not constructed or under construction after SCE&G abandoned it on July 31, 2017, SCE&G is not entitled to recover any revised rates from that date forward. See S.C. Elec. & Gas Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3725742, at *11 n.23 (D.S.C. Aug. 6, 2018) (asserting that “because SCE&G abandoned the Project on July 31, 2017, SCE&G cannot legitimately claim an entitlement to revised rates collected after abandonment because it was no longer constructing the Project”). With this issue settled, the Commission must next determine at which point in the Project continuing construction became imprudent prior to abandonment. The Joint Applicants, however, contend the definitional sections enacted in Act 287 are unconstitutionally retroactive. Their argument is without merit.

It is well-settled that laws “adjusting the burdens and benefits of economic life” enjoy “a presumption of constitutionality.” Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). As the U.S. Supreme Court has held, “[i]t is surely proper . . . to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons” the General Assembly “rationally believes should bear them.” United States v. Sperry Corp., 493 U.S. 52, 65 (1989). Further, “legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). “This is

true even though the effect of the legislation is to impose a new duty or liability based on past acts.” Usery, 428 U.S. at 16.

The mere fact that a statute has a retrospective application does not necessarily render it unconstitutional. For instance, a statute that merely clarifies rather than changes existing law does not operate retrospectively even if it is applied to transactions predating its enactment. The retroactive nature of clarifying legislation has limits and must not operate in a manner that would unjustly abrogate “vested rights.”

16B AM. JUR. 2D Constitutional Law § 735 (2018) (footnotes omitted); see also Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 33, 736 S.E.2d 651, 660 (2012) (Beatty, J., concurring in part and dissenting in part).

The U.S. District Court for the District of South Carolina expressly rejected the same claims of constitutional infirmity the Joint Applicants seek to advance here:

SCE&G argued, “The Act attaches new legal rights and consequences to events and actions that have already happened, including by redefining ‘prudency,’ a critical term under the BLRA establishing what is, and is not, subject to capital cost recovery.” However, the BLRA did not define “prudency,” so the Act cannot “redefin[e]” “prudency.” Instead, the Act provides the first definition of the term “prudency” and “imprudency” as related to the BLRA. “Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question.” Neither does the Act’s definition of “prudency” in this case answer the retroactivity question. SCE&G argues, “The definition of ‘prudent’ . . . is explicitly not related to concepts of ‘negligence, carelessness, or recklessness,’ which leaves entirely unclear the standard that the PSC should impose under this new definition.” However, the same was true before passage of the Act because the BLRA did not define “prudency,” also leaving unclear the standard that the PSC should impose when making prudency determinations. Therefore the Act does not “attach[] new legal consequences to events completed before its enactment.”

S.C. Elec. & Gas Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3751470, at *2 n.5 (D.S.C. Aug. 7, 2018) (quoting Rivers v. Roadway Exp., Inc., 511 U.S. 298, 308 (1994); Langraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

The district court got it right. Given that the BLRA never defined prudence, Act 287 merely “clarified existing law” by engrafting, for the first time, definitions of the terms “prudence” and “imprudence.” 16B AM. JUR. 2D Constitutional Law § 735. The Act, therefore, “does not operate retrospectively even if it is applied to transactions predating its enactment.” Id. To the extent the definition could be deemed retroactive in effect, the General Assembly properly exercised its legislative power. See Pension Ben. Guar. Corp., 467 U.S. at 729; Usery, 428 U.S. at 16. Although the Joint Applicants ask the Commission to employ a definition of prudence that they unilaterally determined was applicable during the Project, that is not allowed under the law. The General Assembly passed a bill that became law, the law survived a constitutional challenge in federal court, and the Commission is required to follow it. Accordingly, the definitions of prudence and imprudence apply to the present proceeding before the Commission.

Turning to Act 287, the term imprudence is defined as follows:

(23) “Imprudent” or “imprudence” includes, but is not limited to, lack of caution, care, or diligence as determined by the commission in regard to any action or decision taken by the utility or one acting on its behalf including, but not limited to, its officers, board, agents, employees, contractors, subcontractors, consultants affecting the project, or any other person acting on behalf of or for the utility affecting the project. Imprudent or imprudence includes, but does not require, a finding of negligence, carelessness, or recklessness.

Imprudence on behalf of any contractor, subcontractor, agent, or person hired to construct a plant or perform any action or service on behalf of the utility shall be attributed to the utility.

S.C. Code Ann. § 58-33-220(23).

Likewise, Act 287 provides the following definition of prudence:

(24) “Prudent”, “prudence”, or “prudency” means a high standard of caution, care, and diligence in regard to any action or decision taken by the utility or one acting on its behalf including, but not limited to, its officers, board, agents, employees, contractors, subcontractors, consultants affecting the project, or any other person acting on behalf of or for the utility affecting the project.

To the extent a utility enters a contract with a third party that delegates some or all decision-making authority related to the project, the utility retains the burden of establishing the prudency of specific items of cost or specific third-party decisions.

“Prudent”, “prudence”, or “prudency” also requires that any action or decision be made in a timely manner.

S.C. Code Ann. § 58-33-220(24).

In making a prudency determination, the General Assembly requires the Commission to consider at least the following factors:

- (a) whether the utility acts in a timely manner, with any passage of time which results in increased costs or expense prior to the utility acting or making the decision weighing against a finding of prudency;
- (b) whether prior actions or decisions by the utility were imprudent and such imprudent actions led to a decision by the utility that could otherwise be prudent. Such circumstances weigh against a finding of prudency; and
- (c) any other relevant factors, including commission of a fraudulent act, which are deemed not to be prudent.

As used in item (c), “fraud” includes, in addition to its normal legal connotation, concealment, omission, misrepresentation, or nondisclosure of a material fact in any proceeding or filing before the commission or Office of Regulatory Staff. Proceedings and filings to which the provisions of this paragraph apply include, but are not limited to, rate or revised rate filings, responsive filings, motions, pleadings, briefs, memoranda, document requests, and other communications before the commission or Office of Regulatory Staff.

S.C. Code Ann. § 58-33-220(24)(a)–(c).

Applying these definitions to the facts of this case, based upon the evidence and testimony presented, all costs incurred on the Project after March 12, 2015 were imprudent. At this point, it is beyond dispute that SCE&G failed to disclose any iteration of the Bechtel Report to ORS, and the information contained in the report(s) was material to both ORS and the Commission's oversight of the Project. To be sure, the contents of the Bechtel report would have alerted ORS to the serious financial and scheduling woes facing the Project. SCE&G's assertion of the attorney–client privilege is without merit. Irrespective of the report's nondisclosure, the evidence and testimony in the record confirm the Project's gross mismanagement and demonstrate it was no longer prudent to continue construction after March 12, 2015. Therefore, the Joint Applicants cannot recover any construction financing costs through revised rates from that date forward.

B. The rate elements of the Alternative Levelized Customer Benefits Plan give the ratepayers necessary relief, provide for an appropriate rate, and satisfy the constitutional balancing test.

The sole goal of Speaker Lucas has been to protect the ratepayers by providing the biggest rate cut permissible under the applicable constitutional test. The Commission's paramount consideration in deciding the merger application should be the same—to maximize customer benefits and eliminate the uncertainty that would arise from setting a rate that fails to meet the constitutional test. The Commission must set a rate moving forward that is within the constitutional strike zone. Setting an arbitrarily low rate, while superficially appealing to ratepayers, could ultimately lead to ratepayers paying for more of this failed project than currently included in the rates. Speaker Lucas believes the Commission can provide the finality and certainty craved by ratepayers and businesses by setting the rate at a proper and sustainable level.

“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public interest which is so ‘unjust’ as to be confiscatory.” Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). “All that is protected against, in a

constitutional sense, is that the rates fixed by the [PSC] be higher than a confiscatory level.” Fed. Power Comm’n v. Texaco, Inc., 417 U.S. 380, 391–92 (1974). “Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called ‘fair value’ rate base.” Fed. Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944).

“It is not theory but the impact of the rate order which counts.” Id. at 602. As the U.S. Supreme Court has observed, “[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.” Id. Further, rates are malleable as determined by the Commission. Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm’n of W. Va., 262 U.S. 679, 693 (1923) (“A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.”).

It is beyond dispute, however, that a utility “has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.” Id. at 692–93. Indeed, “[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors’ interests provide only one of the variables in the constitutional calculus of reasonableness.” In re Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968). A utility is only entitled to a rate that “will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the county on investments in other business undertakings” that have “corresponding[] risks and uncertainties.” Bluefield Waterworks & Improvement Co., 262 U.S. at 692. The return must only be “reasonably sufficient to assure confidence in the

financial soundness of the utility . . . and adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.” Id. at 693.

After all, the Commission “must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interest.” Duquesne, 488 U.S. at 313–14 (quoting In re Permian Basin Area Rate Cases, 390 U.S. at 767). “This is not to say that any system of ratemaking applied by a utilities commission, including the specific instructions it has received from its legislature, will necessarily be constitutional. But if the system fails to pass muster, it will not be because the legislature performed part of the work.” Id. at 314.

Speaker Lucas is uniquely positioned to analyze the rate issue before the Commission because of his prior experience litigating the constitutionality of the experimental rate in federal court this summer. That case established that the experimental rate adopted by General Assembly satisfied the applicable constitutional rate test, and SCE&G could sustain such rate levels without adverse consequences to ratepayers. Because the federal court has ruled the experimental rate passes constitutional muster, the Commission must be cognizant of this threshold in setting the final future rate. Setting a rate too low could invite a constitutional challenge and upset the objective of bringing certainty and finality to this failed project. The testimony before the Commission establishes that an artificially low rate could also invite bankruptcy, increase the cost of debt to the utility, and have other adverse impacts on the ratepayers. Any of those options would lead to increased rates to the ratepayers. The risks associated with artificially low rates are too great to justify going down this path. The Commission can bring finality and certainty to ratepayers, while also maximizing the rate benefits to ratepayers, by adopting a rate within the

“zone of reasonableness” surrounding the experimental rate. A rate near the experimental rate would meet that requirement.

The Joint Applicants offered several plans before finally proposing the Alternative Levelized Customer Benefit Plan (Plan B-L). Plan B-L provides the maximum customer benefit to the ratepayers and meets the necessary constitutional balancing test. The B-L Plan offers the following benefits:

- Joint Applicants concede not to ask for a prudency determination after March 12, 2015—the same date used by ORS as the date imprudent actions began;
- Provides \$2.039 billion in refunds over the recovery period requested by ORS;
- Allows Rate Base for NND of \$2.768 billion to be recovered over 20 years;
 - The allowed Rate Base is reduced to \$2.768 billion by excluding the following: legal fees, the irrevocable trust created by SCE&G for senior employees, costs related to Bechtel, and costs incurred in paying the contract with William Timmerman;
 - That rate base is less than the proposed rate base of \$2.772 billion offered in other rate plans.
- Establishes a Return on Equity of 9.9%;
- Establishes cost of debt at 5.56%;
- Excludes the cost of additional generation at the Columbia Energy Center of \$180 million; and
- Reduces the typical residential bill to \$125.26 by adopting ORS’s rate levelization concept.

This rate of \$125.26 falls squarely within the constitutionally allowed zone of reasonableness. Moreover, the other customer benefits offer additional value to the ratepayers. Customers will

recover the majority of the approximately \$2 billion paid to date for the failed project by ratepayers. The cost of debt and rate of return are reduced to unprecedented levels. The ratepayers also receive a new generation facility with no cost increase on monthly bills. These terms accomplish the goal of maximizing the recovery and minimizing the long-term costs associated with the project for our ratepayers. Further, the rate meets the constitutional test for ratemaking. The finality and certainty offered by this plan surpass any other plan before the Commission.

As for the other conditions of the merger, Speaker Lucas will leave those issues to the private sector. However, two issues do impact the rates and ratepayers directly. The Commission should impose a merger condition related to any possible extension of the Atlantic Coast Pipeline into South Carolina. In the event that the Joint Applicants seek to expand into South Carolina in the future, the Commission should protect ratepayers by requiring SCE&G to identify a fuel resource need—including analysis of the severity, frequency, and seasonal timing of such demand—and an evaluation of all reasonable alternatives prior to signing new pipeline capacity contracts. (Tr. p. 2291, ll. 5–11, Nov. 13). Likewise, in the event expansion on those terms is authorized, the Commission should require SCE&G to use the lowest cost provider.

Moreover, the Commission should rule that the Joint Applicants are not entitled to seek recovery of attorney's fees in the rate base stemming from any litigation or investigation—whether it be civil, criminal, or the present proceeding before the Commission—related to the VC Summer plant. SCE&G agreed with this request. (Tr. p. 1879, ll. 21–25; p. 1880, ll. 1–8, Nov. 12). Prabir Purohit, a Dominion witness, also agreed that Dominion would not seek to recover any legal costs from ratepayers. (Tr. p. 426, ll. 4–7, Nov. 21).

III. CONCLUSION

In sum, all costs incurred on the Project after March 12, 2015 were imprudent, and SCE&G is not entitled to recover any construction financing costs from its customers through revised rates

from that date forward. Further, the Joint Applicants are not entitled to recover from customers the attorney's fees stemming from any litigation or investigation related to the VC Summer plant. Because the elements of Plan B-L are in the best interest of the ratepayers and strike the appropriate constitutional balance, the Commission should implement them.

Respectfully submitted,

s/Robert E. Tyson, Jr.

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